

GENERAL LEGAL ISSUES

Mediation

In circuits in which a dependency mediation program has been established, a court, pursuant to rules adopted by the Florida Supreme Court, may refer to mediation all or any portion of a matter relating to dependency. § 44.102(2)(d).

“Dependency matters” means proceedings arising under Part III (Dependency Cases), Part V (Children in Foster Care), and Part VI (Termination of Parental Rights), of Chapter 39. Rule 8.290(a)(1).

“Dependency mediation” means mediation of dependency matters. Rule 8.290(a)(2).

“Mediation” means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives. Rule 8.290(a)(3).

Negotiations in dependency mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients; however, presence of counsel is not required. § 44.1011(2)(e).

Referral.

- All referrals to mediation shall be in written form, shall advise the parties of their right to counsel, and shall set a date for hearing before the court to review the progress of the mediation. In the event the court refers the matter to mediation, the mediation order shall address all applicable provisions of this rule. The mediation order shall be served on all parties and on counsel. Rule 8.290(d).
- Within 10 days of the filing of the order of referral to mediation, any party or participant ordered to mediation may make a written objection to the court about the order of referral if good cause for such objection exists.

If a party objects, mediation shall not be conducted until the court rules on the objection. Rule 8.290(g).

When making referrals to mediation, judges may wish to consider whether there are domestic violence issues in the case that might make the parties unable to effectively mediate. While there is no prohibition on the use of mediation in dependency cases that include domestic violence issues, the imbalance of power among parties in such cases may make mediation inadvisable. See §44.102(2)(c) (providing that upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process).

- The mediation conference may be held at any stage of the proceedings. Unless otherwise scheduled by the court, the mediator or the mediation program shall schedule the mediation conference.

Court application of ADR/mediation and case referrals best practices. All dependency cases, including termination of parental rights, should be screened by the court and ordered to mediation as appropriate.

- Mediation referrals made at the shelter or arraignment hearing should be held within seven to ten days. Available mediation dates should be provided by the ADR program to the court in order to minimize delay and scheduling difficulties.
- In Termination of Parental Rights cases, mediation referrals should be made at the Advisory Hearing and the mediation conference should be held within 30 days. Available mediation dates should be provided by the ADR program to the court in order to minimize delay and scheduling difficulties.

Fees. Section 44.108 (2) is silent on the collection of fees for dependency mediation and an AOSC09-19, which states that no fees shall be charged to parties for dependency mediation services. In Re Alternative Dispute Resolution Services in Florida's Trial Courts, AOSC09-19 (May 6, 2009).

Mediation is confidential and privileged.

Confidentiality in court-connected mediation is controlled by the Mediation Confidentiality and Privilege Act,” §§ 44.401-44.406. The act defines “mediation communication” as an “oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation.” The commission of a crime during a medication is excluded from the definition of a mediation communication. A mediation participant is defined as a mediation party or a person who attends mediation in person or by telephone, video conference, or other electronic means. A mediation party is a person participating directly or through a designated representative if such person either is a named party or a real party in interest. § 44.403.

A court-ordered mediation begins when an order is issued by the court and ends when there is a partial or complete agreement, an impasse is declared, the parties agree to terminate, or termination occurs pursuant to court order, court rule, or law. § 44.404.

The general rule is that mediation communications shall be confidential unless disclosure is required by law, permitted by law, or agreed to by all parties and that a mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel. If the mediation is ordered by the court, a confidentiality violation may subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney fees, and mediator fees. A mediation party is given the privilege to refuse to testify and to prevent any other person from testifying in subsequent proceedings regarding mediation communications. §§ 44.405(1), 44.405(2).

Notwithstanding the general rule regarding confidentiality, the act provides that there is no confidentiality or privilege attached to a signed, written agreement reached during a mediation (unless the parties agree otherwise) or in relation to any mediation communication

1) for which the confidentiality or privilege against disclosure has been waived by all parties; 2) that is willfully used to plan a crime, commit or attempt a crime, conceal ongoing criminal activity, or threaten violence; 3) that requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report; 4) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceedings; 5) offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or 6) offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct. The act also provides that information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation, and that a party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation. §§ 44.405(4)-(6).

In addition to penalties that may be imposed by the court for breaches of confidentiality, the act creates a civil cause of action for an aggrieved party and authorizes the awarding of equitable relief, compensatory damages, attorney fees, and mediator fees. § 44.406.

“Subsequent legal proceeding” means any legal proceeding between the parties to the mediation that follows the court-ordered mediation. § 44.403(5).

Minimum standards and procedures. The Florida Supreme Court shall establish minimum standards and procedures for qualifications, professional conduct, discipline, and training for mediators and who are appointed pursuant to court-order. §44.106.

Pursuant to Rule 10.100(a), Florida Rules for Certified and Court-appointed Mediators, an applicant to be a certified dependency mediator must be at least 21 years of age and of good moral character. In addition, applicants must have the points required for certification under Rule 10.105.

Appointment of the mediator. The mediator or mediation program shall be appointed by the court or stipulated to by the parties. Rule 8.290(e).

- Court appointment: The court, in the order of referral to mediation, shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the action is pending. Rule 8.290(e)(1).
- Party stipulation: Within 10 days of the filing of the order of referral to mediation, the parties may agree upon a stipulation with the court designating:
 - another certified mediator of dependency matters to replace the one selected by the judge; or
 - a mediator other than a senior judge who is not certified as a mediator but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.

- If a mediator agreed upon by the parties or appointed by a court cannot serve, a substitute mediator can be agreed upon or appointed in the same manner as the original mediator.

Disqualification of the mediator. Any party may move to enter an order disqualifying a mediator for good cause. If the court rules that a mediator is disqualified from mediating a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment. Rule 8.290(i).

Immunity. A person appointed pursuant to court order shall have judicial immunity in the same manner and to the same extent as a judge. § 44.107.

Time requirements. Dependency mediation shall be conducted in compliance with the statutory time requirements for dependency matter unless waived by all parties and approved by the court. Rule 8.290(c).

Discovery. Unless stipulated by the parties or ordered by the court, the mediation process shall not suspend discovery. Rule 8.290(k).

Appearances. Rule 8.290(l).

- The court shall enter an order naming the parties and the participants who must appear at the mediation and any parties or participants who are prohibited from attending the mediation. Additional participants may be included by court order or by mutual agreement of all parties.
- Unless otherwise agreed to by the parties or ordered by the court, any party or participant ordered to mediation shall be physically present at the mediation conference. Persons representing an agency, department, or program must have full authority to enter into an agreement that shall be binding on that agency, department, or program. In the discretion of the mediator, and with the agreement of the attending parties, dependency mediation may proceed in the absence of any party or participant ordered to mediation.
- In the discretion of the mediator, and with the agreement of the attending parties, dependency mediation may proceed in the absence of counsel, unless otherwise ordered by the court.
- The court may prohibit the child from appearing at mediation upon determining that such appearance is not in the best interest of the child. No minor child shall be required to appear at mediation unless the court has previously determined by written order that it is in the child's best interest to be physically present. In the written order of referral to mediation, the court shall specify any special protections necessary for the child's appearance.
- In the absence of an order prohibiting the child from mediation, the participation of the child in mediation will be determined by the parties. See Rule 8.290, Committee Note.
- If a party or participant ordered to mediation fails to appear at a duly noticed mediation conference without good cause, the court, upon motion of any party or on its own motion, may impose sanctions. Sanctions against the party or participant failing to appear may include one or more of the following:
 - contempt of court;

- an award of mediator fees;
 - an award of attorney fees;
 - an award of costs;
 - or other remedies as deemed appropriate by the court.
- Rule 8.290(i)(5).

Mediation procedures.

- During the mediation session, the mediator may meet and consult privately with any party, participant, or counsel. Rule 8.290(m).
- The mediator may end the mediation session at any time and may set new times for reconvening the mediation. No further notification shall be required for parties or participants present at the mediation session. Rule 8.290(n).

Mediation reports.

- If agreement is reached as to all or part of any matter or issue, including legal or factual issues to be determined by the court, such agreement shall be immediately reduced to writing, signed by the attending parties, and promptly submitted to the court by the mediator with copies to all parties and counsel. Rule 8.290(o)(1).
- If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation. Rule 8.290(o)(2).
- Upon receipt of a full or partial mediation agreement, the court shall hold a hearing and enter an order accepting or rejecting the agreement consistent with the best interest of the child. The court may modify the terms of the agreement with the consent of all parties to the agreement. Rule 8.290(p).
- In the event of any breach or failure to perform under the court-approved agreement, the court, upon a motion of any party or upon its own motion, may impose sanctions. The sanctions may include:
 - contempt of court;
 - vacating the agreement;
 - imposition of costs and attorney fees;

or any other remedy deemed appropriate by the court. *See* Rule 8.290(q).